Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HECTOR BERELLEZ, BILL WATERS,
PETE GRUDEN and JACK LAWN,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision, which affirmed the denial of petitioners' motion to dismiss on grounds of qualified immunity without determining whether each of respondent's claims considered separately constituted a violation of clearly-established law, is inconsistent with the qualified immunity doctrine as developed by this Court, the Ninth Circuit itself, and other circuits?

2. Whether the Ninth Circuit's decision, which affirmed the denial of petitioners' motion to dismiss on grounds of qualified immunity even though the complaint failed to raise any specific factual allegations about petitioners' allegedly wrongful conduct, is inconsistent with the qualified immunity doctrine as developed by this Court, the Ninth Circuit itself and other circuits?

3. Whether a *Bivens* complaint should be permitted to withstand a motion to dismiss asserting qualified immunity if the complaint does not set forth specific factual allegations of conduct that is violative of the Constitution?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings of this case are as follows: Respondent Humberto Alvarez-Machain is the plaintiff. Petitioners Hector Berellez, Bill Waters, Pete Gruden and Jack Lawn are defendants. Also named as defendants are the United States of America, Francisco Sosa, Antonio Garate-Bustamante, and "five unnamed Mexican nationals currently in the federal witness protection program."

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Hector Berellez, Bill Waters, Pete Gruden and Jack Lawn respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is reported at 107 F.3d 696 (9th Cir. 1997) and is reprinted in the Appendix at 1a-14a. The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at 96 F.3d 1246 (9th Cir. 1996) and is reprinted in the Appendix at 15a-28a. That Court's Order denying rehearing and rehearing *en banc* is reprinted in the Appendix at 77a-78a. The

Memorandum Opinion of the United States District Court for the Central District of California is unreported. It is reprinted in the Appendix at 29a-76a.

JURISDICTION

The Court of Appeals issued its initial opinion on September 24, 1996. Timely petitions for rehearing and suggestions for rehearing *en banc* were filed by petitioners and all other parties. The Court of Appeals issued its amended opinion on February 19, 1997. The Court of Appeals denied all petitions for rehearing and rehearing *en banc* on February 27, 1997. Appendix at 77a-79a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Rule 8 of the Federal Rules of Civil Procedure in applicable part provides:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

STATEMENT OF THE CASE

In this action, plaintiff/respondent Humberto Alvarez-Machain seeks to recover money damages in a *Bivens*[1] action for alleged violations of the United States Constitution by petitioners. Respondent claims to have suffered mistreatment in connection with his arrest in Mexico and removal to the United States by federal agents in 1990. Petitioners assert that they are entitled to qualified immunity from suit.

This case arises out of the 1985 torture and murder in Mexico of Drug Enforcement Administration ("DEA") Agent Enrique Camarena. On the evening of April 2, 1990, respondent—who was then under indictment for Camarena's murder in the United States District Court for the Central District of California—was captured in Mexico. Respondent was brought into the United States at El Paso, Texas, sometime on April 3, 1990, where he was released to DEA officials.[2]

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[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] The factual background of this case is set forth in detail in the criminal proceedings that preceded this litigation. *See United*

Respondent alleges in the First Amended Complaint ("Complaint") that he was interrogated by DEA officials that same day and that he was mistreated in various ways upon his arrival in the United States. Respondent also alleges that he suffered chest pains and a possible "heart attack" on the morning of the next day, April 4, 1990, and was transferred to a medical facility in El Paso. On April 10, 1990, he was moved to Los Angeles, California for arraignment and trial. Complaint, ¶ 20. All of respondent's surviving claims against petitioners relate solely to treatment he allegedly received between the time he arrived in El Paso on April 3, 1990, and went to the hospital on April 4, 1990.

Before commencing this civil action, respondent had separately raised claims of mistreatment in connection with his capture and arrest in an effort to have his indictment dismissed. These claims were rejected early on. According to the district court judge who presided over respondent's criminal proceedings, respondent was asked upon his arrival in El Paso:

> whether he had been tortured, mistreated, or abused. Dr. Machain answered that he had not, though he complained that he had injured his finger on the door of the aircraft.

745 F. Supp. at 604.[3] The court found that:

> [s]hortly after his arrival, Dr. Machain complain[ed] of a pain radiating from his chest and pressure in his chest. He received prompt medical treatment from

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States v. Caro-Quintero, 745 F. Supp. 599, 601-04 (C.D. Ca.), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992), *on remand*, 971 F.2d 310 (9th Cir. 1992).

[3] The Honorable Edward Rafeedie, United States District Judge for the Central District of California, held an evidentiary hearing in appellee's criminal case on May 25, 1990 and based his factual conclusions on the testimony presented at that hearing. *See* 745 F. Supp. at 601.

> Dr. Mesa, a Spanish-speaking physician at Thomason General Hospital in El Paso. Dr. Mesa testified that he examined Dr. Machain from head to foot and found no sign of mistreatment or abuse. Dr. Machain did not mention any mistreatment or abuse. Dr. Mesa prescribed a pain killer. Dr. Machain was subsequently treated by various other medical personnel during his incarceration. At no time did he indicate to the treating personnel that he had been mistreated by his kidnappers.

Id.

Based on these factual determinations, which plainly encompass the period of April 3-4, 1990, Judge Rafeedie concluded that "Dr. Machain's allegations of mistreatment are not worthy of belief," that when he had received his "prompt medical treatment" he said nothing about mistreatment, and thus that, "Dr. Machain's *recent allegations of abuse are simply not credible.*" 745 F. Supp. at 605-06 (emphasis supplied).

Following lengthy criminal proceedings, including an opinion by this Court,[4] respondent was granted a judgment of acquittal in the district court at the completion of the Government's criminal case. The respondent then commenced this action asserting, among other things, *Bivens* claims against these four petitioners. For purposes of this petition, the relevant allegations in respondent's *Bivens* action are that he was met at the El Paso airport by petitioner Berellez and others who informed him he was under arrest. He "was taken to another location and interrogated," during which time he "was threatened by DEA agents. [He] was also denied food during the interrogation." Complaint at ¶ 17.

Respondent also alleges that after this "interrogation . . . DEA Agents, including Defendant Berellez" held him under a false name thereby making it difficult for family and others

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[4] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

to locate him. Complaint ¶ 19. Finally, respondent also alleged that he received inadequate medical attention between April 4 to April 10, 1990. Complaint ¶ 18. He later withdrew that allegation. Appendix at 32a n.3; 52a n.10.

Petitioners promptly moved to dismiss arguing, *inter alia*, their entitlement to qualified immunity. The district court (the Honorable John G. Davies) granted the motion in part and denied it in part.[5] The court held that once respondent arrived in the United States, "he was protected by the Constitution from mistreatment at the hands of his captors." Appendix at 51a. After noting that the Eighth Amendment provides a "baseline of care" for pretrial detainees, the district court held that "[t]hree potential constitutional violations emerge from paragraphs 17 and 19 of the First Amended Complaint." *Id.* at 51a-52a. The district court articulated the three "potential" violations as: "(1) the DEA agents including Berellez 'threatened' Alvarez while interrogating him on April 3-4; (2) the agents denied him food during this time; and (3) the DEA initially incarcerated him under a false name, making it impossible for Alvarez to be reached by his family, attorney or the Mexican government." *Id.*[6]

The district court also observed that:

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[5] Pursuant to 28 U.S.C. § 2679, the district court substituted the United States as the defendant for all nonconstitutional claims against petitioners. Appendix at 37a-42a. The district court also granted petitioners qualified immunity for all constitutional claims arising out of alleged conduct in Mexico. *Id.* at 43a-51a. Qualified immunity was denied petitioners for constitutional claims arising out of alleged conduct in the United States. *Id.* at 51a-52a.

[6] In a footnote, the district court also noted that in paragraph 51 of the First Amended Complaint, as part of his claim for intentional infliction of emotional distress, respondent alleged that Berellez and others "threatened [him], locked him in a small windowless room when he refused to cooperate, and forced him to stand naked and be photographed." Appendix at 52a n.10. The district court stated that it was "unclear whether Alvarez claims that this incident amounted to a constitutional tort." *Id.*

> [e]xcept as these claims identify Berellez, the involvement of the [petitioners] is unclear, rendering it difficult to determine whether they personally participated in or directed the conduct at issue, or knew of the conduct and failed to prevent it.

Appendix at 52a. Despite the conclusory nature of the allegations in the complaint, and even though the court acknowledged that supervisors are not vicariously liable for the constitutional torts of their subordinates, the district court concluded that "the allegations of constitutional wrongs in the United States are sufficient to defeat [petitioners'] claim to qualified immunity" because plaintiff "may be able to prove that the [petitioners] violated his clearly established constitutional rights." *Id.* Thus, the petitioners were denied qualified immunity as to these three claims.

Petitioners and all other parties noticed interlocutory appeals. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985); 28 U.S.C. § 1292. Following full briefing and oral argument, the Court of Appeals disposed of petitioners' qualified immunity arguments in two paragraphs. Appendix at 23a-24a. In the first paragraph, the panel noted that pre-trial detainees "possess a clearly established right to be free from punishment," and that the Eighth Amendment:

> proscribes . . . sanctions that are "so totally without penalogical justification that it results in the gratuitous infliction of suffering." Convicted prisoners and pre-trial detainees are also entitled to "adequate food, clothing, shelter, sanitation, medical care, and personal safety."

Appendix at 23a; 96 F.3d at 1251, quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) and *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

In its second paragraph, the panel noted that the First Amended Complaint "reveals" that petitioners:

> "threatened" [respondent] during an interrogation session on April 3, 1990; withheld food throughout the interrogation; incarcerated him under a false

> name . . . and denied him medical attention. Each of these allegations, if proven, served to create an atmosphere of "gratuitous suffering" in violation of *Hoptowit*. Further, the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause. *Id.* Accordingly, the district court did not err in denying [petitioners'] motion to dismiss these claims.

Appendix at 23a-24a; 96 F.3d at 1251.

All parties, including petitioners, timely filed petitions for rehearing with suggestions for rehearing *en banc*. On February 19, 1997, the Court of Appeals issued an amended opinion. The amended opinion, however, did not alter or amend in any way the Court's initial opinion with respect to petitioners. Appendix at 9a-10a. On February 27, 1997, the Court of Appeals issued an Order denying all petitions for rehearing and for rehearing *en banc*. *Id.* at 77a-78a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S FAILURE TO APPLY THE QUALIFIED IMMUNITY ANALYSIS MANDATED BY THIS COURT RESULTED IN A DECISION WHICH CONFLICTS WITH DECISIONS OF THIS COURT, THE NINTH CIRCUIT AND OTHER CIRCUITS.

In *Behrens v. Pelletier*, 116 S.Ct. 834, 839-40 (1996), this Court recognized, as it has on many prior occasions, that when a government official's motion to dismiss on qualified immunity grounds is rejected, the official is conclusively denied some of the protections the immunity doctrine is intended to provide—namely, the right to avoid the burdens of pretrial litigation processes such as discovery. For this reason, it is critical that a court faced with such a motion carefully apply the proper legal analysis.

In this case, however, the Ninth Circuit, which in two paragraphs cursorily denied petitioners' motion to dismiss,

wholly failed to apply the legal standards developed by this Court and by the Ninth Circuit itself. As a result, the Ninth Circuit has established a precedent in conflict with decisions of this Court and other courts which, if allowed to stand, will significantly decrease the protection afforded to government officials by the qualified immunity doctrine. Indeed, the Ninth Circuit completely abdicated its responsibility to analyze correctly petitioners' assertion of qualified immunity.

The objective analytic framework a court must apply when faced with a claim of qualified immunity was set forth by this Court in a line of cases beginning with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The threshold question is whether the law applicable to the challenged conduct was clearly established at the time. *Harlow*, 457 U.S. at 818-19. If the law was not clearly established, then the claim of qualified immunity must prevail. *Id.* The court must also consider whether the facts alleged by the plaintiff assert a violation of a constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Finally, even if the law was clearly established and the plaintiff has alleged facts which assert a violation, the defendant is still entitled to qualified immunity if a reasonable official in his position would have believed the conduct to be lawful. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *see also Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Prior to the decision in this case, the Ninth Circuit had formulated a two-part analysis for qualified immunity determinations:

> 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable official have believed the conduct was lawful?

Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993); *see also Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994). The Ninth Circuit has subsequently

reiterated this standard. *See Somers v. Thurman*, 109 F.3d 614, 617 (9th Cir. 1997).[7] Other circuits apply a similar analysis. *See Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 496 (7th Cir. 1993).

On a motion to dismiss, therefore, the court must test the allegations in the complaint against the governing legal standard for qualified immunity. *See Behrens v. Pelletier*, 116 S.Ct. at 840 (at the motion to dismiss stage, "it is the defendant's conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness' "). The Ninth Circuit, which was obliged to review the denial of the motion to dismiss *de novo*, failed to engage in the proper analysis and, therefore, denied petitioners the protection to which they are entitled by the qualified immunity doctrine.

A. The Ninth Circuit's Cursory Analysis of Whether Respondent Has Alleged Violations of Clearly Established Law Is Erroneous and Inconsistent With Governing Case Law.

As noted above, the threshold question in the qualified immunity analysis is whether the law applicable to the government official's challenged conduct is clearly established. *Harlow*, 457 U.S. at 818. Although the Ninth Circuit's decision makes a brief allusion to this issue, it wholly fails to apply this Court's, or even its own, requisite analysis necessary to resolve the qualified immunity inquiry properly.

Respondent's claims are based on allegations concerning his treatment while being interrogated by DEA agents on April 3, 1990. Although the due process clause of the Fifth Amendment governs the rights of a pre-trial de-

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[7] In *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996), the Ninth Circuit described the analysis as a three-part test, adding as the initial inquiry the question of what legal right was allegedly violated.

tainee, *see Bell v. Wolfish*, 441 U.S. 520 (1979), Eighth Amendment case law prescribes the minimum standard of care. *See City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). This Court has made it clear that in assessing a claimed violation of the Eighth Amendment, a court may not simply conflate all of a plaintiff's claims of mistreatment and find that the "overall conditions" to which the plaintiff is subjected constitute improper punishment. *See Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991). Instead, the court must address each claimed violation separately, and determine whether each resulted in a deprivation of constitutional proportions. The Ninth Circuit has required the same issue-by-issue analysis of Eighth Amendment claims. *See Hoptowit v. Ray*, 682 F.2d 1237, 1246-47 (9th Cir. 1982).

The Ninth Circuit's decision at issue here, however, utterly ignores that precedent. Indeed, it takes precisely the type of "totality of circumstances" approach explicitly forbidden by the case law. The Ninth Circuit's opinion lists four alleged constitutional violations which the district court discerned from the complaint: that a DEA agent "threatened" respondent during an interrogation session; that food was withheld; that respondent was incarcerated under a false name; and that respondent was denied adequate medical attention.

As a preliminary matter, it must be noted that the Ninth Circuit's reliance on the denial of medical attention claim was wholly mistaken, since respondent withdrew this claim before the case ever reached the appellate court. Appendix at 32a n.3; 52a n.10.[8] Moreover, rather than analyzing each violation separately, the Ninth Circuit simply asserted that "[e]ach of these allegations, if proven,

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[8] The fact that respondent withdrew the claim based on denial of medical attention was mentioned by petitioners in both their initial appellate brief as well as in their petition for rehearing. Nevertheless, the Ninth Circuit failed to correct its error in its amended opinion. Appendix at 10a.

served to create an atmosphere of fear and isolation, imposing 'gratuitous suffering' in violation of *Hoptowit*." Appendix at 10a. This analysis is in direct conflict with both *Wilson v. Seiter* and *Hoptowit*.

Not only was the Ninth Circuit required to consider each alleged deprivation separately, it was also required to determine whether the law with respect to each such violation was clearly established under the particular circumstances before it. *See Anderson v. Creighton*, 483 U.S. at 639-40. The general statement, standing alone, that standards under the Eighth Amendment are clearly established because the case law indicates that the Eighth Amendment prohibits the "gratuitous infliction of suffering," does not satisfy this requirement. *Id.*

The Ninth Circuit's only attempt at particularized consideration of respondent's claims appears in its statement —which again relies on the erroneous belief that improper medical treatment was a viable claim before it—that "the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause." Appendix at 10a. The Court of Appeals did not undertake any further analysis of respondent's specific claims. The court's erroneous approach led to its erroneous conclusions that the law with respect to respondent's three pending claims was clearly established and that respondent had alleged violations of his constitutional rights.

The Ninth Circuit erred in concluding that respondent's allegation that he had been threatened during the interrogation stated a violation of clearly-established law. In the first place, respondent's complaint contains no information about the alleged threats, including what was said, who said it, the context in which the alleged threats were made or the alleged consequences to respondent of the alleged threats. Indeed, the district court acknowledged as much. Appendix at 52a. Thus, respondent has not alleged sufficient facts for the court even to determine whether any rights were violated. Moreover, both the Ninth Circuit and other courts

have explicitly found that "[v]erbal harassment or abuse" of prisoners "is not sufficient to state a constitutional deprivation." *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987), quoting *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979). *See also Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985) ("[v]erbal threats are not constitutional violations"); *Thomas v. Cabanow*, 1991 WL 183868, *12 (N.D. Ind. 1991), *aff'd*, 978 F.2d 1261 (7th Cir. 1992) (citing numerous cases for the proposition that "[i]t is well-established that allegations of verbal abuse and threats, as well as threatening gestures and conduct by correctional officers and officials" do not state constitutional violations). Had the Ninth Circuit properly considered this case law, it could not have concluded that respondent's alleged right to be free from threats was clearly established. Its denial of qualified immunity with respect to this claim is plainly erroneous.

Respondent's allegations concerning the alleged deprivation of food are likewise devoid of details. Although petitioners do not dispute that a deprivation of food, in some circumstances, can reach constitutional proportions, whether it does so depends on the length and circumstances of the deprivation. *See Willis v. Bell*, 726 F.Supp. 1118, 1122-23 (N.D. Ill. 1989), *modified on other grounds*, 999 F.2d 284 (7th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994). The complete lack of any factual allegations in the complaint means that the court was not provided with sufficient information to determine whether a violation had occurred. In fact, the Ninth Circuit has recently held that a prisoner's failure "to allege facts establishing the deprivation of adequate food" falls short of a constitutional violation. *May v. Baldwin*, 109 F.3d 557, 566 (9th Cir. 1997). Certainly respondent has failed to come forward with factual allegations in response to petitioners' claim to qualified immunity. His failure must redound to his detriment.

Finally, as to respondent's claim that he was incarcerated under a false name, petitioners have found no cases, and none were cited by any party or the courts below, which support the proposition that it is a violation of clearly established law to hold a pre-trial detainee under a false name. Respondent has made no allegation that he was denied access to counsel in violation of the Sixth Amendment or that his being held under a false name otherwise impinged upon rights of a constitutional scope.

Thus, the Ninth Circuit's failure to analyze each claim raised by respondent, as required by *Wilson v. Seiter* and *Hoptowit*, resulted in its erroneous determination that the law with respect to each claim was clearly established and that respondent had properly asserted a constitutional violation with respect to each claim. Its decision is in conflict with qualified immunity jurisprudence, with the case law defining Eighth Amendment analysis and with the case law relating to the subject matter of respondent's specific claims.

B. The Ninth Circuit's Failure to Apply the Proper Qualified Immunity Analysis Allowed Respondent's Claims to Stand Despite the Fact That Respondent Has Not Alleged Specific Wrongful Conduct by the Petitioners.

Although the Ninth Circuit's analysis of the first part of the qualified immunity test is minimal at best, its "analysis" of the second part of the test—whether the official defendant could reasonably have believed that his conduct was lawful under the circumstances—is non-existent. The Ninth Circuit did not weigh the allegations in respondent's complaint against this standard at all. Its decision accordingly allows the respondent to survive a motion to dismiss on qualified immunity grounds simply by alleging a violation of a constitutional right, without *any* attention to the reasonableness of the individual petitioners' alleged actions. This

result is in direct conflict with the explicit requirements of this Court's qualified immunity cases.[9]

The Ninth Circuit's failure to reach the second part of the test had significant and wholly unwarranted consequences in this case. Had the Ninth Circuit considered whether the individual petitioners could reasonably have believed that their actions were lawful, it would, of necessity, have had to consider the complaint's allegations concerning those petitioners. In doing so, the Ninth Circuit could not have overlooked the fact that, as to three of the four petitioners (Waters, Gruden and Lawn), the complaint contains *no* allegations that they took any actions at all with respect to the purported constitutional violations in which respondent's remaining claims are based. In fact, as the district court essentially stated, the complaint neither alleges that Waters, Gruden nor Lawn participated in the allegedly wrongful acts, nor that they directed them. Appendix at 52a.[10] By allowing respondent's claims to stand in the absence of such allegations, the Ninth Circuit has established a precedent which conflicts not only with the very purposes of qualified immunity but also with well-established case law providing that *Bivens* liability cannot be predicated upon respondeat superior or other theories of vicarious liability and, instead, requires direct personal involvement in the allegedly wrongful acts. *See Taylor v.*

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[9] In *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995), the Ninth Circuit stated in a footnote that it was not always necessary to address the second part of the test. 27 F.3d at 1449 n.19. Assuming for a moment that *Chew* is correct on this point, the Ninth Circuit's failure to consider the allegations (or absence thereof) regarding specific wrongful conduct by specific defendants in this case resulted in the erroneous denial of petitioners' motion to dismiss.

[10] The complaint alleges that petitioners Waters, Gruden and Lawn "participated in the decision to kidnap Plaintiff Alvarez in violation of international law." (Complaint, ¶¶ 7, 8, 9.) However, respondent's claims regarding his kidnapping in Mexico are not at issue here. Appendix at 44a-51a.

List, 880 F.2d 1040, 1045 (9th Cir. 1989); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 681 (9th Cir. 1984).

The Ninth Circuit's decision is also in conflict with this Court's direction that a claim cannot go forward if respondent has failed to allege facts that establish a constitutional violation by petitioners. *See Siegert v. Gilley*, 500 U.S. at 232. Plainly, a complaint which does not allege any acts or personal involvement in any acts on the part of defendants cannot allege that those defendants committed constitutional violations. Under the approach adopted by the Ninth Circuit in this case, *any* government official in a supervisory position could be sued and subjected to discovery despite the total absence of allegations that he or she participated in any way in the conduct in question. Not only would this result chill action by government officials, it would chill government service itself.

Even as to petitioner Berellez, the complaint alleges only that he and other DEA agents participated in the interrogation and threatened respondent. Complaint, ¶¶ 19, 51. It does not contain any allegations of specific conduct by Berellez, nor does it allege any specific involvement by Berellez in the alleged deprivation of food or incarceration under a false name. Allowing a case to go forward against a government official when the plaintiff fails to allege any personal involvement by that official directly contravenes the very purpose of the qualified immunity doctrine. This is particularly so where, as here, the respondent's allegations of mistreatment have been litigated in his prior criminal proceeding and found to be "not worthy of belief." *United States v. Caro-Quintero*, 745 F. Supp. at 605.[11]

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[1] Oddly, the Ninth Circuit gave no weight to Judge Rafeedie's findings as they impact petitioners, while at the same time holding that his findings in respondent's "criminal action bars Alvarez-Machain from pressing the issue [of extraterritorial application of the Fifth Amendment] again in the civil arena." Appendix at 10a-11a.

The Ninth Circuit's decision is also in direct conflict with decisions of other circuits which hold that a plaintiff cannot survive a motion to dismiss on qualified immunity grounds if his complaint contains generalized pleading which fails to allege specific wrongdoing by particular defendants. *See Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995); *Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 995 (5th Cir.), *cert. denied*, 115 S. Ct. 2555 (1995). The approach adopted by the Ninth Circuit in this case makes "[t]he promise of early exit from a lawsuit offered by qualified immunity . . . an empty promise." *Veney*, 70 F.3d at 922.

II. THE LEGAL STANDARD APPLICABLE TO A MOTION TO DISMISS ON QUALIFIED IMMUNITY GROUNDS IS AN IMPORTANT ISSUE WHICH THIS COURT SHOULD DECIDE.

Qualified immunity entitles its possessor to avoid the burdens of litigation," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), including the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. For this reason, this Court's decisions have emphasized that "qualified immunity questions should be resolved at the *earliest possible* stage of a litigation." *Anderson v. Creighton*, 483 U.S. at 646 n.6 (emphasis added).

A motion to dismiss is the earliest vehicle by which defendants may dispose of claims against them. Such motions play a key role in providing government officials with the protection from litigation to which they are entitled under the qualified immunity doctrine. *See Behrens v. Pelletier*, 116 S.Ct. at 839-40. Defining the proper standard for analysis of such motions is, therefore, of critical importance to the effectuation of the doctrine.

In this case, petitioners sought to dismiss the complaint on qualified immunity grounds because the respondent had not alleged any actions personally taken by petitioners

which violated his constitutional rights. After searching respondent's complaint for allegations of potential violations, the district court stated that

> Except as these claims identify Berellez, the involvement of the four moving defendants is unclear, rendering it difficult to determine whether they personally participated in or directed the conduct at issue, or knew of the conduct and failed to prevent it.

Appendix at 52a. Despite the wholly conclusory nature of the allegations concerning petitioners' conduct, the district court denied the motion to dismiss, and the denial was affirmed by the Ninth Circuit. The district court reached this conclusion notwithstanding its acknowledgment of the paucity of factual allegations in the complaint. Instead, the court wrongly concluded that because "the pleading requirements of Fed. R. Civ. P. 8 are minimal . . . Alvarez may be able to prove that [respondents] violated his clearly established constitutional rights and will be given the opportunity to obtain such proof." Appendix at 52a.

The district court's analysis is precisely backwards, placing as it does the discovery cart before the immunity horse. If conclusory allegations such as those made by respondent here are enough to force a government official to bear all the burdens of litigation, the protection against the burdens of the discovery process, which the qualified immunity doctrine is supposed to offer, will mean very little.

Some circuits have addressed this problem by imposing a "heightened pleading standard" in qualified immunity cases—that is, requiring the plaintiff to plead specific facts establishing that the qualified immunity doctrine does not apply in order to survive a motion to dismiss.[12] *See*

[12] Petitioners did not ask the court below to impose a heightened pleading standard in so many words. However, at every stage of this litigation petitioners have argued that the complaint failed

Wicks v. Mississippi State Employment Services, 41 F.3d 991 (5th Cir.), *cert. denied*, 115 S. Ct. 2555 (1995); *Dunbar Corp. v. Lindsey*, 905 F.2d 754 (4th Cir. 1990); *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1995); *Kartseva v. Department of State*, 37 F.3d 1524 (D.C. Cir. 1994); *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (*en banc*), *petition for cert. filed*, No. 96-827 (Nov. 25, 1996). Other circuits, including the Ninth Circuit, have refused to apply the heightened pleading standard in all qualified immunity cases, holding instead that it only applies when the defendant's subjective intent is an element of the alleged constitutional violation. *See Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457 (9th Cir. 1994); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492 (7th Cir. 1993). This Court has not yet addressed this question. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), which involved the question of whether a heightened pleading standard should apply in municipal liability suits under 42 U.S.C. § 1983, this Court expressly noted that it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials." 507 U.S. at 166-67.

The issue of whether conclusory allegations such as those made by respondent in this case are sufficient to defeat a motion to dismiss and thereby deny government officials the full protection of the qualified immunity doctrine is of key importance both to official defendants and to courts faced with such motions. Petitioners respectfully submit that this Court should take jurisdiction of this case to resolve this issue.

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specifically to allege unlawful actions personally taken by defendants. Therefore, the issue of the level of factual specificity which must be pled to survive a motion to dismiss on qualified immunity grounds was clearly raised.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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